Supreme Court, U.S.
FILED
JUL 29 1993
OFFICE OF THE CLERK

No. 92-1546

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the federal gift tax applies to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-28a) is reported at 981 F.2d 991. The panel opinion of the court of appeals (Pet. App. 29a-49a) is reported at 936 F.2d 343. The memorandum opinion of the district court (Pet. App. 50a-59a) is unofficially reported at 89-2 U.S.T.C. (CCH) ¶ 13,818.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. The petition was filed on March 23, 1993, and was granted on June 14, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

1. The relevant portions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), are set forth at Pet. App. 60a. The relevant portions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), are set forth at Pet. App. 60a-63a.

2. Section 25.2518-2(c)(3) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2518-2(c)(3), provides, in relevant part:

> * * * With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers for this purpose. With respect to transfers made by a decedent at death or transfers which become irrevocable at death, a taxable transfer occurs upon the date of the decedent's death. * * *

STATEMENT

This case concerns the gift tax liability of Sally Ordway Irvine that stems from her disclaimer, in 1979, of a portion of her remainder interest in the Lucius P. Ordway Trust.

1. In 1917, Mrs. Irvine's grandfather, Lucius P. Ordway, established an irrevocable inter vivos family trust, into which he contributed substantial assets.[1]

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[1] Congress enacted the first federal estate tax in 1916. See Revenue Act of 1916, ch. 463, §§ 200-212, 39 Stat. 756, 777. After enactment of the federal estate tax, but before enactment of the federal gift tax, it was possible for wealthy

The income of the trust was to be paid to Mr. Ordway's wife and their five children during their lives. The trust also provided that, if any Ordway child died before the trust was terminated, that child's issue and the child's surviving spouse (if not remarried) would receive the child's share of the trust income (Pet. App. 2a-3a). Upon the death of the last to survive of Mrs. Ordway and the Ordway children, the trust was to terminate. The corpus of the trust was then to be distributed to Mr. Ordway's grandchildren in equal shares. If any of the Ordway grandchildren died with issue prior to the termination of the trust, that grandchild's share of the principal was to be distributed to his or her surviving issue, per stirpes (*ibid.*).

Mrs. Irvine became aware of her remainder interest in the trust when she reached the age of majority in 1931 (Pet. App. 3a). After her father died in 1966, she became entitled to receive (and did receive) a share of the trust income each year (Pet. App. 2a-3a; J.A. 64). Between 1931 and 1979, she took no steps to disclaim either her income or remainder interests in the trust.

On June 27, 1979, the last of Lucius Ordway's children died, and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at that time. A thirteenth grandchild had died with issue. The trust's corpus was therefore divided into thirteen shares. On August 21, 1979, Mrs. Irvine

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individuals to employ inter vivos family trusts to transfer assets to their spouses or descendants without incurring any federal tax liability. An important objective of the federal gift tax was to curb evasion of the estate tax through use of such pretestamentary gifts. See *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939).

filed a disclaimer of five-sixteenths of her interest in the trust corpus. That partial disclaimer was valid under Minnesota law. See Minn. Stat. Ann. § 501.221 (West 1988). As a result of her disclaimer, each of Mrs. Irvine's five children received one-sixteenth of her share of the distributed trust principal (Pet. App. 3a, 52a).

Mrs. Irvine filed a federal gift tax return for the third quarter of 1979. That return disclosed that she had disclaimed a portion of her interest in the Ordway Trust, but took the position that the disclaimer did not effect a transfer of property to which the gift tax applied. Upon audit, the Commissioner of Internal Revenue determined (i) that the disclaimer constituted an indirect "transfer of property by gift" within the meaning of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), and (ii) that the disclaimer was not excepted from tax under Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), because the disclaimer had not been made "within a reasonable time" (*ibid.*) after Mrs. Irvine became aware of her interest in the trust. Mrs. Irvine then filed an amended gift tax return on which she reported the disclaimer as a taxable gift. Along with her amended return, she paid the federal gift tax shown to be due of $7,486,671. She thereafter paid an additional $2,086,627 in accrued interest on the deficiency (Pet. App. 4a, 31a).

Meanwhile, in August 1980, Mrs. Levine made a gift that was unrelated to her 1979 disclaimer. She filed a gift tax return for the third quarter of 1980, on which she claimed that the tax due on that gift was offset by the unified credit available to her under 26 U.S.C. 2505. The Commissioner notified Mrs.

Irvine, however, that the adjustments required for her amended 1979 third-quarter gift tax return—which reported her partial disclaimer as a gift—reduced the amount of unified credit available to her. As a result, she owed an additional $44,035 in gift taxes for the gift made in 1980. Mrs. Irvine paid the additional tax owed for 1980, plus $10,959 in accrued interest (Pet. App. 31a-32a).

Mrs. Irvine thereafter filed a timely claim for refund of the gift tax and interest paid for the third quarter of 1979 and the third quarter of 1980. The claim for refund was denied by the Internal Revenue Service (Pet. App. 4a, 32a).

2. After Mrs. Irvine's death in 1987, respondents —who are the personal representatives of her estate —filed this action seeking a refund of the gift tax and interest paid. On cross-motions for summary judgment, the district court held that the tax was improperly assessed and ordered a refund of tax and interest in the amount of $22,748,250 (Pet. App. 4a, 32a-33a).

The district court acknowledged that, in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), this Court held that "a disclaimer [is] a 'transfer' within the scope of the gift tax provisions" (*id.* at 318). The district court concluded, however, that "[t]he fundamental distinction between *Jewett* and the present case is that the original transfer by Lucius Ordway occurred in 1917, well before the Gift Tax Act was passed in 1932" (Pet. App. 56a). The district court noted that, "[a]s originally enacted, the 1932 Gift Tax Act clearly states that '[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act'" (Pet. App. 56a-57a (quoting Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245)). The

court therefore concluded that the gift tax could not apply to the disclaimer in this case (Pet. App. 57a).

In reaching its conclusion, the district court noted that another district court had "reached the same conclusion on virtually identical facts" in a case involving a partial disclaimer by one of Mrs. Irvine's brothers of his remainder interest in the Ordway Trust (Pet. App. 58a, citing *Ordway* v. *United States*, 89-1 U.S.T.C. (CCH) ¶ 13,802 (S.D. Fla. Mar. 13, 1989)). The court stated that it found the reasoning of the "indistinguishable" *Ordway* decision to be "compelling" (Pet. App. 58a).

3. A divided panel of the court of appeals reversed (Pet. App. 29a-49a). Judge McMillian, writing for the court, noted that the Eleventh Circuit, in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991), had reversed the decision on which the district court had relied. Judge McMillian stated that "[w]e agree with the Eleventh Circuit that the fact that the creation of the Ordway trust in 1917 pre-dated the enactment of the federal gift tax in 1932 is not dispositive" (Pet. App. 35a). He concluded that the gift tax properly applies to Mrs. Irvine's disclaimer because here, "as in *Ordway*, the government does not seek to tax the transfers that created the Ordway trust in 1917; it seeks to tax Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in the trust, an indirect transfer which occurred well after * * * the enactment of the gift tax in 1932" (*id.* at 36a).

Judge McMillian noted that "[t]he scope of [the gift] tax is broad, applying 'whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible' " (Pet. App. 34a, quoting

McDonald v. *Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988), cert. denied, 490 U.S. 1005 (1989)). He concluded that here, as in *Jewett*, the disclaimer constitutes "an indirect gift to a successor in interest subject to federal gift tax liability" (Pet. App. 35a, quoting 455 U.S. at 306).

Judge McMillian further concluded that Mrs. Irvine had failed to come within the regulatory safe habor for disclaimers that occur "within a reasonable time" after the taxpayer acquires knowledge of the interest being disclaimed (Pet. App. 39a-40a). This safe-harbor provision, Section 25.2511-1(c)(2) of the gift tax regulations, states in pertinent part as follows (26 C.F.R. 25.2511-1(c)(2) (emphasis supplied)):

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, * * * a refusal to accept ownership does *not* constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.

This regulatory safe harbor applies only to disclaimers from "taxable transfers" (26 C.F.R. 25.2511-1(c)(2)). Respondents asserted "that the creation of the Ordway trust could not have been a 'taxable transfer' because * * * there was no gift tax when the * * * trust was created in 1917" (Pet. App. 37a). The term "taxable transfer" is defined in the regulations, however, to include any "completed gift for Federal gift tax purposes regardless of whether a gift tax [was] imposed on the completed gift" (*ibid.*, quoting 26 C.F.R. 25.2518-2(c)(3)). Since the irrevocable transfer of assets to the trust in 1917 represented a completed gift by Mr. Ordway, it was a "taxable transfer" within the meaning of the regula-

tion even though a tax had not been imposed on that gift. Judge McMillian concluded that the establishment of the Ordway Trust represented a "taxable transfer" under the regulation and that the regulation is therefore *potentially* available as a mechanism to permit a timely disclaimer by Mrs. Irvine to escape tax (Pet. App. 37a).

In *Jewett*, however, this Court held that the "reasonable time" for a disclaimer to be made runs from the time "when the disclaimed interest was created and not later when that interest vested" (Pet. App. 39a, citing 455 U.S. at 312, 318-319). Since Mrs. Irvine disclaimed her remainder interest in 1979, which was "some 48 years" after she first became aware of her interest, Judge McMillian stated that the disclaimer "was clearly too late" (Pet. App. 39a).[2]

Senior Judge Bright filed a concurring opinion. In his view, the term "taxable transfer," as used in Regulations Section 25.2511-1(c)(2), "merely describes a class of interests to which the regulation applies based upon the nature of the transactions creating them. It is not meant to literally refer solely to transfers in which gift taxes were assessed" (Pet. App. 43a). Judge Bright concluded that "Mrs. Irvine's remainder interest was subject to the federal gift tax unless her disclaimer * * * was timely" (*ibid.*). He stated that "the time period for Mrs. Irvine to dis-

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[2] The panel noted that respondents had not contended that *Jewett*, which was decided in 1982, should not be applied "retroactively" to this case (Pet. App. 41a). The panel therefore declined to consider that issue (*ibid.*). Judge McMillian noted, however, that the Court had found no retroactivity problem in *Jewett* because the taxpayer "never had such a right" to disclaim his interest free of the gift tax (*id.* at 41a n.2, quoting 455 U.S. at 317).

claim her interest began to run, at the latest, in 1931 when she was aware of her remainder interest and had reached the age of majority" (*ibid.*). He concluded that "Mrs. Irvine's partial disclaimer, almost 50 years later, was not made within a reasonable time" (*id.* at 43a-44a).

Judge Bowman dissented. He stated that Section 25.2511-1(c)(2) of the regulations "reflects the unassailable premise that a disclaimer is not subject to the federal gift tax unless the transfer creating the interest disclaimed was a 'taxable transfer' for purposes of the Gift Tax Act" (Pet. App. 44a). "Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917" (*id.* at 48a), Judge Bowman reasoned that "it never was subject to the federal gift tax and therefore was never a 'taxable transfer' for federal gift tax purposes" (*ibid.*).

4. On respondents' petition for rehearing with suggestion for rehearing en banc, the court of appeals vacated the panel decision and affirmed the district court by a 7-4 vote (Pet. App. 1a-28a). The majority stated that "*Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here" (*id.* at 6a n.2). The majority noted that Section 25.2511-1(c)(2) of the regulations refers to "*taxable transfers* creating an interest in the person disclaiming made before January 1, 1977" (Pet. App. 5a, quoting 26 C.F.R. 25.2511-1(c)(2)). In the majority's view, that regulation "reflects the fundamental principle that a disclaimer should not be subject to the federal gift tax unless the transfer creating the interest dis-

claimed was itself a 'taxable transfer' " (Pet. App. 5a-6a). The majority reasoned that, "absent this limitation, the gift tax would be imposed on a donee's refusal to accept a gift that never was subject to the tax in the first place, an anomaly that Congress, given its clear intent * * * that the gift tax should not have any retroactive application, did not ordain" (*id.* at 6a). The majority held that the creation of the trust in 1917, 15 years before the enactment of the gift tax, did not constitute a "taxable transfer" within the meaning of the regulation, and that, as a result, the regulation's timeliness requirement did not apply (*id.* at 6a-7a).[3]

The majority then concluded that, because Section 25.2511-1(c)(2) of the regulations is inapplicable, "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (Pet. App. 10a). Noting that Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), the majority concluded that "this disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*). The majority acknowledged (*id.* at 7a-8a) that its holding was in direct conflict with the Eleventh Circuit's decision in *Ordway* v. *United States*, *supra*, which upheld application of the gift tax to a disclaimer made by another beneficiary of the same trust. Pet. App. 8a.

Judge Loken filed a concurring opinion. He wrote separately "to address whether the regulation in ef-

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[3] The majority stated that "[w]e have difficulty in understanding how there can be, in the language of section 25.2518-2(c)(3), 'a completed gift for Federal gift tax purposes' unless a federal gift tax is in force when the gift is made" (Pet. App. 8a-9a, quoting 26 C.F.R. 25.2518-2(c)(3)).

fect when Mrs. Irvine made her disclaimer applies to this case" (Pet. App. 12a). Judge Loken noted that "[the regulation as initially promulgated in 1958 did not contain the current regulation's reference to 'taxable transfers' " (*ibid.*). In his view, "this prior version of the regulation does not apply in this case because it only applied to 'property transferred from a decedent,' whereas the interest Mrs. Irvine disclaimed was created by an inter vivos trust" (*id.* at 13a).

Judge McMillian filed a dissenting opinion in which Senior Judges Lay and Bright and Judge Gibson joined. In their view, "the majority opinion's interpretation of 'taxable transfer' as a transfer made after the enactment of the federal gift tax is too narrow" (Pet. App. 17a). They would have followed the Eleventh Circuit's decision in *Ordway* and held (i) that the "reasonable time" within which a taxpayer may avoid the gift tax by refusing to accept ownership of property is governed by Section 25.2511-1(c) of the regulations, and (ii) that the term "taxable transfer" as used in that regulation includes " 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax" (Pet. App. 17a-18a, quoting *Ordway* v. *United States*, 908 F.2d at 895). The dissent concluded that "whether or not the interest created was established before the enactment of the federal gift tax is irrelevant; the key is whether the interest was created by a 'taxable transfer,' that is, a completed gift" (Pet. App. 20a).

SUMMARY OF ARGUMENT

I

The federal gift tax reaches all gratuitous transfers of property, whether direct or indirect, and no matter how "conceptual or contingent" the property interest may be. *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943). In *Jewett* v. *Commissioner*, the Court held that a disclaimer of a remainder interest in a trust, which causes the interest to pass to the next qualified person designated in the trust instrument, represents an indirect transfer of a property interest to which the gift tax "unquestionably" applies. 455 U.S. at 310. The Court's holding in *Jewett* governs this case.

The fact that the remainder interest disclaimed in 1979 by Mrs. Irvine was created in 1917—before the gift tax was enacted in 1932—does not alter the fact that her disclaimer is subject to tax. The gift tax applies to the "transfer of property by gift" (26 U.S.C. 2501(a)(1)). Many property rights currently in existence were created before 1932. So long as the "transfer" that is the subject of the tax occurred after the tax was enacted in 1932, it is irrelevant when the property right being transferred was created. It is the date when the taxpayer transferred her remainder interest by disclaimer, not the date when the interest was created, that determines the applicability of the gift tax. Because her disclaimer occurred in 1979—long after the gift tax was enacted—it is subject to tax.

II

The Treasury Regulations on Gift Tax establish a safe harbor under which a disclaimer is *not* subject

to the gift tax if two conditions are met: (i) the disclaimer must be effective under local law; and (ii) the disclaimer must be made "within a reasonable time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1(c)(2)). This Court held in *Jewett* v. *Commissioner* that the "reasonable time" within which the disclaimer must be made runs from the time that the interest being disclaimed was created, rather than from the time the interest vested and became possessory. 455 U.S. at 310, 312. In *Jewett*, a disclaimer made 33 years after the interest was created was held to be untimely under the regulation. *Id.* at 306, 318-319. Mrs. Irvine's delay of 48 years was even greater than the delay found untimely in *Jewett*. Her 1979 disclaimer is therefore not within the regulatory safe harbor and remains subject to tax.

The court of appeals erred in concluding that the safe-harbor provision is inapplicable to this case because the regulation applies only to disclaimers following "taxable transfers" (26 C.F.R. 25.2511-1(c)(2)). The court reasoned that the 1917 transfer creating the trust in this case preceded the gift tax and was thus not a "taxable transfer." The term "taxable transfer" is defined by the regulations, however, to mean simply a completed gift, "regardless of whether a gift tax is imposed on the completed gift" (26 C.F.R. 25.2518-2(c)(3)). The irrevocable transfer that created the trust in 1917 was a completed gift (*Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 43-44 (1939)) and thus a "taxable transfer" under the definition employed in the regulation. The taxpayer's failure to disclaim her interest in the trust within a "reasonable time," however, bars her reliance on this regulatory safe-harbor provision.

The court of appeals also erred in concluding that, if the safe-harbor provision is inapplicable to the taxpayer's disclaimer, then the disclaimer escapes tax simply because it was valid under state law. An invalid disclaimer, of course, would not effect a "transfer" of property, by gift or otherwise. A valid disclaimer that fails to qualify under the safe-harbor provision, however, is taxable under the general provisions of the regulation and the statute. In *Jewett*, this Court unequivocally rejected the contention that state law governs the taxability of disclaimers under the federal gift tax. 455 U.S. at 316. A disclaimer that is valid under state law, but that fails to satisfy the "reasonable time' requirement of the federal regulation, is subject to the federal tax. *Ibid.*

ARGUMENT

I. THE FEDERAL GIFT TAX APPLIES TO MRS. IRVINE'S DISCLAIMER OF HER REMAINDER INTEREST IN THE ORDWAY TRUST

A. The Disclaimer Of A Remainder Interest In A Trust Represents A Transfer Of Property To Which The Federal Gift Tax Applies

Sections 2501(a) and 2511(a) of the Internal Revenue Code impose a tax "on the transfer of property by gift," whether the transfer "is in trust or otherwise," and whether the gift is "direct or indirect" (26 U.S.C. 2501(a), 2511(a); see 26 C.F.R. 25.2511-1(c)(1)). By taxing gifts, Congress sought to discourage circumvention of the estate tax by the use of lifetime transfers that deplete taxable estates. See, *e.g.*, *Jewett* v. *Commissioner*, 455 U.S. at 310; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939); note 1, *supra*. To achieve that objective,

Congress designed "the gift tax statute to reach all gratuitous transfers of any valuable interest in property" (*Dickman* v. *Commissioner*, 465 U.S. 330, 334 (1984)). See H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932); S. Rep. No. 665, 72d Cong., 1st Sess. 39 (1932). The statute is broadly written to reach gratuitous transfers of all forms of property and property interests, "however conceptual or contingent" those interests may be. *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943).

This case involves the transfer of property by means of a disclaimer. By refusing to accept ownership of property, the disclaimant causes the property to pass to the next qualified person designated in a governing instrument such as a will or deed of trust. In *Jewett* v. *Commissioner*, this Court held that such a disclaimer indirectly effects a "transfer of property by gift" (26 U.S.C. 2501(a)) and is therefore subject to the federal gift tax. 455 U.S. at 309-310. The Court noted that the practical effect of a disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (*id.* at 310). The Court held that, in view of its "expansive" scope, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust" (*ibid.*).[4]

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[4] Three Justices dissented from this holding in *Jewett*, noting that the disclaimant in that case had never enjoyed present ownership of either the capital or the income of the trust. 455 U.S. at 324 (Blackmun, J., dissenting). The majority in *Jewett* observed, however, that the interest disclaimed need not be possessory to represent an interest in "property" under

The Court's holding in *Jewett* applies directly to the 1979 disclaimer by Mrs. Irvine of her remainder interest in the Ordway Trust. The determination in *Jewett* that a disclaimer is a transfer subject to the gift tax disposes of that same issue in this case. See also note 4, *supra*.

B. The Fact That The Ordway Trust Was Created Before The Federal Gift Tax Was Enacted Is Not Relevant

The court of appeals correctly noted that, in enacting the federal gift tax, Congress specified that "'[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932.]' Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169, 245" (Pet. App. 7a).[5] The court erred,

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the gift tax statute. The transfers of "property" to which the gift tax applies include transfers of "contingent," as well as possessory, interests. See 455 U.S. at 309-310, citing *Smith* v. *Shaughnessy*, 318 U.S. at 180.

Moreover, the facts of the present case reflect that Mrs. Irvine had received income from the Ordway Trust for many years before she partially disclaimed her interest in the trust capital upon distribution. See J.A. 64. Under the view expressed by the dissent in *Jewett*, the fact that Mrs. Irvine had long enjoyed the present right to receive this income from the Trust would represent a "vital fact that distinguishes the case" and justify application of the federal gift tax to her disclaimer. 455 U.S. at 327. Under the reasoning of both the majority and the dissent in *Jewett*, the federal gift tax thus properly applies to Mrs. Irvine's 1979 disclaimer of her interest in the Ordway Trust.

[5] Congress adopted this requirement to comply with this Court's decisions in *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), and *Nichols* v. *Coolidge*, 274 U.S. 531 (1927), which had held various retroactive features of the 1924 gift tax to

however, in suggesting that, because the Ordway Trust was created in 1917, before the gift tax was enacted, taxing Mrs. Irvine's 1979 disclaimer of her interest in the trust would "apply the tax retroactively" (*ibid.*). The court similarly erred in suggesting (*id.* at 6a n.2, 7a) that this Court's decision in *Jewett*—which concerned the disclaimer of an interest in a trust that was created in 1939, *after* the gift tax was enacted—is distinguishable on that basis.

The gift tax applies to the "transfer of property by gift" (26 U.S.C. 2501(a)(1)). Many property rights currently in existence were created before 1932. So long as the "transfer" that is the subject of the tax occurred after 1932, it is irrelevant when the property right being transferred was created. See Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245. The court of appeals simply misperceived the transaction that the government seeks to tax in this case. It is Mrs. Irvine's 1979 transfer by disclaimer, not her grandfather's 1917 transfer in trust, upon which the gift tax is laid. No gift tax has been imposed on Lucius Ordway's original transfer in trust. Mrs. Irvine's partial disclaimer of her remainder interest

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be unconstitutional under the Due Process Clause. The continuing force of the *Untermyer* and *Nichols* decisions has occasioned much speculation. See, *e.g.*, *United States* v. *Hemme*, 476 U.S. 558, 568 (1986); *Estate of Ceppi* v. *Commissioner*, 698 F.2d 17, 21 (1st Cir.), cert. denied, 462 U.S. 1120 (1983); *Sidney* v. *Commissioner*, 273 F.2d 928, 932 (2d Cir. 1960) (Friendly, J.) (questioning whether "*Untermyer* remains authority at all"). Because the 1932 gift tax incorporated a statutory non-retroactivity requirement, however, the scope of any constitutional restriction on retroactive application of the statute is not at issue.

in 1979, however, is a separate and distinct transaction.

Mrs. Irvine's remainder interest in the Ordway Trust was a valuable property interest, even though it was subject to contingencies and did not become possessory until immediately before she partially disclaimed it in 1979. See *Jewett* v. *Commissioner*, 455 U.S. at 318-319; *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). After the death of her father in 1966, Mrs. Irvine became entitled to receive a share of the income of the trust each year. Moreover, for 48 years, Mrs. Irvine possessed the power to decide the ultimate disposition of her remainder share of the corpus of the trust, and she relinquished that power only after her interest became possessory in 1979.[6] It is precisely upon the relinquishment of her power to control the disposition of this property that the gift tax is laid. See, *e.g.*, *Estate of Sanford* v. *Commissioner*, 308 U.S. at 43; *Burnet* v. *Guggenheim*, 288 U.S. 280, 285-287 (1933). As this Court stated in *Jewett*, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust," for the effect of the disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (455 U.S. at 310).

It is thus the date that the interest was transferred by disclaimer, not the date that the interest was created, that is relevant for application of the gift tax. The Court emphasized this same distinction in

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[6] The trust did not preclude Mrs. Irvine from receiving her share of the corpus and, if she did not consume it, leaving it by will to any person or entity of her choosing.

United States v. *Jacobs*, 306 U.S. 363 (1939). In *Jacobs*, a joint tenancy for certain property had been created between husband and wife in 1909, before the first estate tax was enacted in 1916. See note 1, *supra*. The husband died in 1924. Because he had furnished the consideration for the property, the government sought to include the full value of the joint property in the husband's gross estate. The estate argued that this represented an improper "retroactive" application of the estate tax to an interest created before the tax was enacted. The Court rejected that contention, concluding that "the tax was not levied on the 1909 transfer and was not retroactive" (*id.* at 366). The Court noted that the estate tax was imposed on the "change in ownership" that occurred in 1924, an event that transpired *after* the estate tax was enacted. *Id.* at 367. The Court held that (*ibid.*):

> the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.

See also *Fernandez* v. *Wiener*, 326 U.S. 340, 355 (1945) ("a tax upon the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process"); *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 345 (1929) (a tax is not retroactive when it applies to a transfer that "followed the passage of the statute"); *Chase Nat'l Bank* v. *United States*, 278 U.S. 327, 335-336 (1929); *Gladney* v. *Commissioner*, 745 F.2d 955, 964 (5th Cir. 1984), cert. denied, 474 U.S. 923 (1985).[7]

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[7] The majority erred in relying (Pet. App. 9a-10a) on *Commissioner* v. *Copley's Estate*, 194 F.2d 364 (7th Cir. 1952). In *Copley's Estate*, a couple entered into an antenuptial agree-

As the dissenting judges correctly noted in this case, "the majority opinion seeks to inject the issue of retroactivity into this case where none actually exists" (Pet. App. 22a-23a n.2). Here, as in *Jacobs*, the post-enactment transfer by disclaimer of Mrs. Irvine's interest in the pre-enactment trust represented "a change in the nature of ownership of property [that] was designated by Congress as an appropriate occasion for the imposition of a tax" (306 U.S. at 371).

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ment in 1931 under which the prospective husband agreed to pay $1 million to his future wife upon demand at any time after their marriage. In return, she surrendered any other marital property rights to which she may have been entitled. In fulfillment of this pledge, the husband transferred $500,000 in securities to his wife in 1936 and the same amount in 1944. Although such a transfer of property in return for the surrender of marital property rights had been held to be a gratuitous transfer (see *Commissioner* v. *Wemyss*, 324 U.S. 303, 306-307 (1945)), the Seventh Circuit held that the transfers involved in *Copley's Estate* were not subject to the gift tax because the relevant transaction preceded enactment of the tax. In the Seventh Circuit's view, in 1936 and 1944, the husband was simply discharging an obligation that arose under the 1931 agreement. The court concluded that, in these circumstances, subjecting the transfers to the gift tax would have amounted to a retroactive imposition of the tax. 194 F.2d at 367. By contrast, in the present case, it is the disclaimer made by Mrs. Irvine in 1979—not the distribution of the trust assets upon termination of the trust—that is being subjected to tax.

The facts of *Copley's Estate* would parallel the facts of the present case only if *Copley's Estate* involved a gratuitous transfer *by the wife after 1932* of her right to receive the property from her husband. In that hypothetical situation, as here, the gratuitous transfer of an interest in property after 1932 would plainly be subject to the gift tax.

II. MRS. IRVINE'S 1979 DISCLAIMER IS NOT PROTECTED BY THE REGULATORY SAFE HARBOR FOR DISCLAIMERS MADE WITHIN A "REASONABLE TIME" OF THE ESTABLISHMENT OF THE TRUST

1. The Treasury Regulations on Gift Tax implement the broad scope of the federal tax by providing that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1(c)(1)). Since the promulgation of these regulations in 1958, however, the Commissioner of Internal Revenue has recognized a narrow exception, or safe harbor, to this general rule of taxability. See 26 C.F.R. 25.2511-1(c) (1958); Pet. App. 60a-61a. Both originally and in their current form,[8] the regulations provide that a refusal to accept ownership of property does not constitute a gift if two conditions are met. First, the refusal must be effective under local law. Second, the refusal must be made "within a reason-

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[8] Section 25.2511-1(c)(2) of the regulations, as amended in 1986, supersedes the 1958 version of that regulation and is controlling in this case. Treasury Regulations and rulings are retroactive to the effective date of the statute to which they relate, unless retroactive application is limited by the Secretary or constitutes an abuse of discretion. See *Automobile Club* v. *Commissioner*, 353 U.S. 180, 184 (1957); *Redhouse* v. *Commissioner*, 728 F.2d 1249, 1251 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); *Manocchio* v. *Commissioner*, 710 F.2d 1400, 1403 (9th Cir. 1983). See also 26 U.S.C. 7805(b) (the Secretary "may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect").

able time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1(c)(2)).[9]

This Court held in *Jewett* that the "reasonable time" within which the disclaimer must be made runs from the time that the interest being disclaimed was created, rather than from the time that the interest vested and became possessory. 455 U.S. at 310.[10] In *Jewett*, the trust was established in 1939 but the taxpayer did not disclaim his contingent remainder interest until 1972. The Court held that the disclaimer —filed 33 years after the interest was created—was untimely. *Id.* at 306, 318-319.

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[9] The safe-harbor regulation creates an exception from the gift tax that does not exist on the face of the statute. In *Jewett*, the Court rejected the taxpayer's argument that the regulation affording a "reasonable time" for a disclaimer to escape tax could not "retroactively" be applied to interests that had been created before the regulation was adopted. The Court stated that the taxpayer's argument "is based on an assumption that petitioner had a 'right' to renounce the interest without tax consequences that was 'taken away' by the 1958 Regulation. Petitioner never had such a right." 455 U.S. at 317.

[10] As this Court explained in *Jewett*, the "reasonable time" requirement reflects the concern that a delayed renunciation, although perhaps timely as a matter of state law, is unacceptable for federal tax purposes because of the role delay may play in personal estate planning. 455 U.S. at 316 n.17. The Court noted that "the passage of time is crucial to the scheme of the gift tax." *Ibid.*, quoting *Jewett* v. *Commissioner*, 70 T.C. 430, 431 (1978). Time allows the designated beneficiary to exercise control over the disposition of an interest while evaluating whether to retain the property or allow it to pass to the next generation. The regulation, in this manner, makes an appropriate distinction between timely disclaimers that generate no gift tax liability and untimely disclaimers that are subject to tax.

In this case, Mrs. Irvine's remainder interest was created upon Lucius Ordway's original transfer in trust in 1917. She learned of her interest in the trust by the time she reached the age of majority in 1931. Mrs. Irvine became entitled to a share of the income from the Ordway trust after her father's death on January 19, 1966, and her share increased after the death of her mother on August 27, 1974 (J.A. 64). Mrs. Irvine did not renounce her interest in the trust corpus, however, until the trust was terminated in 1979. At that time, she was 68 years old, and had known of her remainder interest in the trust for at least 48 years.[11] As was true in *Jewett*, the practical effect of Mrs. Irvine's disclaimer was "to reduce the expected size of [her] taxable estate and to confer a gratuitous benefit upon the natural objects of [her] bounty" (455 U.S. at 310). Here, as in *Jewett*, Mrs. Irvine's 1979 disclaimer was not made within a "reasonable time" (455 U.S. at 318-319), therefore does not qualify under the regulatory safe-harbor provision and thus remains subject to gift tax. See also note 4, *supra*.

2. The court of appeals concluded, however, that Section 25.2511-1(c)(2) of the gift tax regulations does not apply in the circumstances of this case. Under the regulation, a disclaimer is *not* subject to the gift tax if it is made within a "reasonable time" after the "taxable transfer" that created the interest (26 C.F.R. 25.2511-1(c)(2)). See note 8, *supra*. The court of appeals concluded that the creation of

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[11] Due to this lengthy delay, she was in a far better position to determine whether she needed the property for her own use or could afford to transfer it directly to the next generation, thereby saving estate taxes at her death. See *Jewett* v. *Commissioner*, 455 U.S. at 316 n.17.

the trust in 1917, fifteen years before the gift tax was enacted, did not constitute a "taxable transfer" within the meaning of the regulation and that, as a result, the regulation's "reasonable time" provision does not apply in this case (Pet. App. 6a-7a).

a. As the Eleventh Circuit correctly recognized in *Ordway* v. *United States*, 908 F.2d at 895, however, the term "taxable transfer" in the amended regulation merely refers to a transfer that is a completed gift, whether or not a gift tax was actually imposed.[12]

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[12] The preexisting disclaimer regulation (26 C.F.R. 25.2511-1(c) (1958)) was amended in 1986. See note 8, *supra*. The amendment was designed to conform the regulations under Section 2511 to the new regulations being promulgated at the same time under Section 2518 of the Code. See 45 Fed. Reg. 48,922 (July 22, 1980).

Section 2518 of the Internal Revenue Code, which was enacted in 1976, prospectively eliminated the "reasonable time" requirement of the regulation and established uniform rules applicable to the timeliness of disclaimers. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1896. Under the new statute, to avoid tax, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest is made or the day on which the person making the disclaimer attains age 21. 26 U.S.C. 2518(b)(2). Section 2518 is not directly involved in this case because it applies only to disclaimers of interests that were created after December 31, 1976 (26 C.F.R. 25.2518-1(a)), and Mrs. Irvine's interest was created in 1917. Congress contemplated that existing rules would continue to govern the timeliness of disclaimers made after 1976 of interests in property created before 1977. H.R. Rep. No. 1380, 94th Cong., 2d Sess. 67-68 (1976).

To coordinate with the effecive date of Section 2518, the Secretary proposed to amend Section 25.2511-1(c) by differentiating between disclaimers of property interests created before January 1, 1977, and those created after December 31, 1976. The Secretary proposed a new regulation, Section

Section 25.2518-2(c)(3) of the regulations specifically provides that, "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a com-

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25.2518-1, governing qualified disclaimers under Section 2518 for interests created after December 31, 1976. For the disclaimer of interests created before January 1, 1977, the Secretary proposed to preserve the existing rule by recognizing that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer" (Prop. Reg. § 25.2511-1(c)(2), 45 Fed. Reg. 48,925 (1980)). As noted by the dissenting judges below, "§ 25.2511-1(c)(2) and § 25.2518 are complementary regulations: interests created by 'taxable transfers' made after December 31, 1976, are subject to the 'new' uniform standards established by the 1976 Act and § 25.2518, while interests created by 'taxable transfers' before January 1, 1977, are subject to the 'old' standards set forth in § 25.2511-1(c)(2)" (Pet. App. 20a).

As originally proposed, the amended regulations did not refer to "taxable transfers" creating interests in the person disclaiming. See Prop. Reg. § 25.2511-1(c)(1), 45 Fed. Reg. 48,924 (1980) (referring to "a transfer creating an interest in the person disclaiming made after December 31, 1976"); Prop. Reg. § 25.2511-1(c)(2), 45 Fed. Reg. 48,924 (1980) (referring to "transfers creating an interest in the person disclaiming made before January 1, 1977"); Prop. Reg. § 25.2518-1(a), 45 Fed. Reg. 48,925 (1980) (referring to "the qualified disclaimer of transfers creating an interest in the person disclaiming made after December 31, 1976"). The term "taxable transfer" was first used when the amendments to Sections 25.2511-1 and 25.2518-1 were published in final form. See T.D. 8095, 1986-2 C.B. 160, 164, 165. This phrasing incorporated the explanation of Section 2518 that had been prepared by the Joint Committee on Taxation, which stated that, "[f]or purposes of this [statute], a transfer is considered to be made when it is treated as a taxable transfer, i.e., a completed transfer for gift tax purposes with respect to inter vivos transfers or upon the date of the decedent's death with respect to testamentary transfers" (Staff of the

pleted gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." 26 C.F.R. 25.2518-2(c)(3). For the purpose of measuring the time in which to file a tax-free disclaimer, a "taxable transfer" occurs under the regulations "whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax" (*Ordway* v. *United States*, 908 F.2d at 895, quoting 26 C.F.R. 25.2511-1(c)(1)).[13]

Under this express regulatory definition, the irrevocable transfer in trust made by Mrs. Irvine's grandfather in 1917 constitutes a "taxable transfer" for purposes of the disclaimer regulation even though that transfer "was not subject to the gift tax" (26 C.F.R. 25.2511-1(c)(1)).[14] Hence, whether the in-

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Joint Committee on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 591 (Jt. Comm. Print. 1976)).

[13] The court of appeals suggested in this case that the regulatory definition of the term "taxable transfer"—which refers to any "completed gift" without regard to "whether a gift tax is imposed on [that] gift" (26 C.F.R. 25.2518-2(c)(3))—is concerned "with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers" (Pet. App. 9a). As the dissent correctly pointed out, however, "[t]he reference to the $10,000 annual exclusion on gifts in § 25.2518-2(c)(3) is merely *an illustration* of how a taxable transfer may occur when there is a completed gift regardless of whether the gift tax is imposed on the completed gift" (Pet. App. 22a). The single illustration provided by the regulation obviously does not exhaust the entire scope of its provisions.

[14] The gift in trust was completed by Mrs. Irvine's grandfather in 1917 when he relinquished power to control further disposition of the trust property. See *Estate of*

terest disclaimed by Mrs. Irvine was created before or after enactment of the federal gift tax, her failure to disclaim her interest "within a reasonable time" precludes her reliance on the safe-harbor provisions of the regulation.

The "reasonable time" requirement of the regulation addresses the question of "how long" the disclaimant has been aware of the property interest, not whether the property was initially transferred in trust on a taxed or tax-free basis. Whether or not the interest disclaimed was created before the federal gift tax was enacted is not relevant under the regulatory safe-harbor provision. Under the express terms of Sections 25.2511-1(c)(2) and 25.2518-2(c)(3) of the regulations, "as long as the transfer effected a completed gift of property, then the transfer is a 'taxable transfer,' even though the transfer may not be subject to federal gift tax" (Pet. App. 18a (McMillian, J., dissenting)).

The Internal Revenue Service has consistently adopted and applied this same understanding of the definition of "taxable transfer" contained in the regulation. When, as here, "[t]he Commissioner's interpretation of the Regulation has been consistent over the years," it "is entitled to respect." *Jewett* v. *Commissioner*, 455 U.S. at 318. See also *United States* v. *Nat'l Bank of Commerce*, 472 U.S. 713, 730 (1985).

b. Even if the court of appeals had been correct in concluding that the safe-harbor regulation does *not* apply to Mrs. Irvine's disclaimer, that would not sup-

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Sanford v. *Commissioner*, 308 U.S. at 43-44; *Burnet* v. *Guggenheim*, 288 U.S. at 286 (the gift is complete when it is "put beyond recall").

port a conclusion that the disclaimer is exempt from tax. The regulation merely creates a narrow exception to the otherwise comprehensive scope of the gift tax. It provides that if a disclaimer is made within a reasonable time, then (and only then) it "does *not* constitute the making of a gift" (26 C.F.R. 25.2511-1(c)(2)) (emphasis added). If a disclaimer does not come within the terms of this regulatory safe harbor, it is taxable under the general rule of the regulation (and the statute) that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1(c)(1)). See *Dickman* v. *Commissioner*, 465 U.S. at 334 ("Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property").

In holding that Mrs. Irvine's disclaimer was not taxable if the safe-harbor provision was *not* applicable to her disclaimer, the court of appeals turned the gift tax scheme on its head. The regulation establishes a limited exception to the scope of the gift tax in the case of a disclaimer made "within a reasonable time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1(c)(2)). As this Court held in *Jewett*, absent the lenity provided by the regulatory safe-harbor provision, the taxpayer "never had * * * a right" to escape taxation of her disclaimer. 455 U.S. at 317; see note 9, *supra*.

Such exemptions from taxation are to be narrowly construed: if a transaction does not come within the terms of the exemption, it remains taxable. See, *e.g.*, *Dickman* v. *Commissioner*, 465 U.S. at 334 n.4; *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969). If the majority's reading of "taxable transfer" were

correct, it would serve only to narrow the exception to taxability of disclaimers set forth in Section 25.2511-1(c)(2) of the regulations. It would not allow the disclaimer to escape tax.

3. The court of appeals further erred in concluding that, if the "reasonable time" requirement of Section 25.2511-1(c)(2) of the regulations is inapplicable to this case, then "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (Pet. App. 10a). Based on this erroneous conclusion, the court held that, because Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), her "disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*).[15] The analysis applied by the court of appeals in this case was specifically repudiated by this Court in *Jewett* v. *Commissioner*.

The validity of the disclaimer under local law (which here, as in *Jewett*, 455 U.S. at 311, has not been contested by any party) is relevant only because, if the disclaimer were *not* valid under local law, there would have been no completed transfer and this case would never have arisen. See 26 U.S.C. 2501(a)(1) (imposing a tax on "the transfer of property by gift"). The fact that the disclaimer was valid under Minnesota law merely establishes that there was in fact a "transfer of property" (*ibid.*). It has no bearing on whether or not that transfer was "by gift" and is therefore subject to the gift tax. The question

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[15] As we have already shown, if the safe harbor afforded by Section 25.2511-1(c)(2) of the regulations is not available in this case, then the disclaimer is taxable under the general provisions of the statute and regulation. See pages 14-20, 27-28, *supra*.

whether a disclaimer constitutes a transfer of property "by gift" was resolved by this Court in *Jewett*, where the Court held that the transfer "by means of a disclaimer[] of a contingent future interest in a trust" is "unquestionably" within the scope of the gift tax (455 U.S. at 310).

By treating state law as dispositive of the existence of federal gift tax liability, the court of appeals has, perhaps unconsciously, resurrected the discredited rationale of its decisions in *Keinath* v. *Commissioner*, 480 F.2d 57, 61 (8th Cir. 1973), and *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*). In those cases, the court of appeals held that, because Section 25.2511-1(c) did not specify what is a "reasonable time," state law controlled that determination. Those decisions were relied on by the taxpayer in *Jewett* for the contention that the draftsmen of the regulation merely intended to codify cases holding that "state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation." 455 U.S. at 315. This Court disagreed, noting that the taxpayers' "interpretation of the Regulation would render half of it superfluous" (455 U.S. at 316):

> The Regulation explicitly imposes two requirements: (1) the disclaimer must be effective as a matter of local law; and (2) the disclaimer must be made within a reasonable time. If timeliness were governed solely by local law, the second requirement would be redundant. While it is possible that local law may require a disclaimer to be timely to be effective, such a requirement would not absolve the taxpayer from the separate timeliness requirement imposed by the federal Regulation. Otherwise, the Regulation would be

complete with a single requirement that the disclaimer be effective under local law.

The fact that Mrs. Irvine's disclaimer was valid under state law obviously does not, by itself, establish an exemption from tax. If it did, *any* valid disclaimer would be exempt and the gift tax would never apply to a "transfer of property by gift" (26 U.S.C. 2501(a)(1)) effected by means of disclaimer. The Court squarely rejected that very contention in *Jewett*. 455 U.S. at 316.

The court of appeals failed in this case to recognize the differing purposes behind state and federal timeliness requirements for disclaimers.[16] State property law concepts regarding the refusal to accept ownership do not adequately deal with the federal concern that disclaimers may be used in an attempt to evade the gift or estate tax. State law, which is primarily concerned with balancing conflicting claims to property and with protecting the rights of creditors and other third parties, may allow considerable time to pass after a person learns of a property interest before he must disclaim. See *Jewett* v. *Commissioner*, 70 T.C. at 436-437. The federal gift tax is concerned, however, with control over the disposition of property: "the passage of time is crucial to the scheme of the gift tax" (*Jewett* v. *Commissioner*, 455 U.S. at 316 n.17, quoting *Jewett* v. *Commissioner*, 70 T.C. at 437). The fact that the disclaimer was valid

[16] "Since the federal revenue laws are designed for a national scheme of taxation, their provisions are not to be deemed subject to state law 'unless the language or necessary implication of the section involved' so requires." *Helvering* v. *Stuart*, 317 U.S. 154, 161 (1942), quoting *United States* v. *Pelzer*, 312 U.S. 399, 402-403 (1941).

under Minnesota law does not satisfy the federal gift tax concern that Mrs. Irvine's 48-year delay "made it likely that the renunciation decision was part of the taxpayer's personal estate planning" (*Jewett* v. *Commissioner*, 455 U.S. at 316 n.17).

Because Mrs. Irvine waited 48 years to disclaim her interest in the Ordway Trust, her disclaimer was not made within the "reasonable time" required to obtain the protection of the regulatory safe harbor. The 1979 disclaimer of her interest in the Trust represents a transfer of property by gift (*Jewett* v. *Commissioner*, 455 U.S. at 310) and is therefore properly subject to the federal gift tax.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60328